Filed 4/7/04 In re Ashley K. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ASHLEY B.K., a Minor.	B172800
GLEN K., Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent.	(Super. Ct. No. CK18496)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	

ORIGINAL PROCEEDING; petition for writ of mandate. Albert J. Garcia, Temporary Judge. (Pursuant to Cal. Const. art. VI, § 21.) Petition denied.

David Villa for Petitioner.

No appearance for Respondent.

Lloyd W. Pellman, County Counsel, Aleen Torossian, Deputy County Counsel for Real Party in Interest Los Angeles County Department of Children and Family Services.

Petitioner Glen K. is the father of Ashley B.K., a child who has been declared a dependent of the juvenile court. In the instant proceeding, Glen seeks extraordinary writ review (Welf. & Inst. Code, § 366.26, subd. (*l*);[1] Cal. Rules of Court, rule 39.1B) of the juvenile court's order setting a hearing for the selection and implementation of a permanent plan for Ashley, with the possibility of termination of the parental relationship. Glen contends there was insufficient evidence to support the juvenile court's finding the return of Ashley to his care would create a substantial risk of detriment to her well-being.[2]

FACTS AND PROCEDURAL BACKGROUND

On October 4, 2001, when Ashley was nine months old, the juvenile court sustained the Department's petition to declare Ashley a court dependent (§ 300). The court found Ashley was exposed to domestic violence when Glen choked Lena B., both parents had a history of drug abuse and drug-related convictions, Glen had a conviction for rape and was a registered sex offender, and both parents had a history of mental and emotional problems placing Ashley at risk of physical and emotional harm.

On December 21, 2001 the court ordered the Department of Children and Family Services (Department) to provide family reunification services for Glen, and ordered Glen to participate in parenting education, a drug and alcohol rehabilitation program with random testing, and individual counseling to address domestic violence, mental health issues, and anger management. Glen was also ordered to comply with the conditions of his parole and to continue to register as a sex offender.

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[1] Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

[2] Ashley's mother, Lena B., has filed a purported joinder in Glen's petition. Lena seeks no relief on her own behalf, but indicates agreement with Glen's arguments and his contention Ashley should be returned to Glen's care.

In its report for the six-month review hearing (§ 366.21, subd. (e)), the Department indicated Glen was in full compliance with the court's orders requiring him to participate in counseling, education programs, and random drug and alcohol testing. The Department also reported however that Glen had made repeated threats to harm Lena, as a result of which Lena obtained a restraining order. Also, on several occasions Glen had engaged in delusional and paranoid behavior,[3] probably due to his failure to take medication prescribed for his mental and emotional instability. Finally, the report indicated Glen's parole agent had expressed great concern over the prospect of his regaining custody of Ashley in view of his mental instability, his serious criminal history dating back to his teenage years, and his now transient status. The Department recommended the court terminate reunification services for Glen, in view of his convictions of violent felonies.[4] The court found Glen to be in partial compliance with his case plan and ordered continued family reunification services.

In its report for the 12-month review hearing (§ 366.21, subd. (f)), the Department indicated Glen had completed a parenting program, continued to attend his counseling and therapy sessions, and had tested clean on nine occasions between January and April of 2002. Glen had found housing in a one-bedroom apartment with an elderly couple. At the hearing on October 23, 2002, the court found Glen in partial compliance with his case

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[3] On one occasion, Glen telephoned the social worker to report that somebody had broken into his apartment and poisoned his coffee, and that Lena was using his neighbor's residence as a whorehouse. In another phone call, Glen told the social worker he had changed his locks three times because somebody, probably Lena, continued to break in, rearrange his possessions, and steal money and clothing. Ultimately, Glen reported that he had moved out of his apartment because someone continued to break in, rearrange his clothing, and put methadone in his coffee.

[4] Section 361.5, subdivision (b)(12) provides a parent may be denied reunification services if the court finds, by clear and convincing evidence, he has been convicted of a violent felony. The record shows Glen has convictions for crimes including forcible rape, robbery, burglary, grand theft, assault with a deadly weapon, possession of narcotics, and failure to register as a sex offender.

plan and continued the matter for the 18-month permanency planning hearing. (§ 366.22.)

In a report for the permanency planning hearing submitted February 25, 2003, the Department recommended the court terminate family reunification services for Glen and set a hearing pursuant to section 366.26 for Ashley. Although Glen continued to comply with his case plan and to have successful monitored visits with Ashley, the Department considered Glen not capable of raising a child in view of his lengthy past history of violent criminality, domestic violence and mental illness, and his failure to understand and take responsibility for any of his actions.[5] In a supplemental report submitted April 8, 2003 the Department advised that on March 22 Glen had tested positive for marijuana, and later told the social worker the testing facility must have made a mistake. The Department further reported that Glen had been diagnosed with schizophrenia, and he had refused to sign forms verifying that he was taking his required medication. In an additional report, the Department indicated Glen had twice more tested positive for marijuana, had failed to appear for another test, and had refused to sign a release to enable the social worker to obtain updated information on his treatment programs.

On May 2, 2003, following a contested hearing, the court terminated reunification services as to both parents and set a hearing pursuant to section 366.26. Glen and Lena challenged the setting order by petition for extraordinary writ (Cal. Rules of Court, rule 39.1B), alleging the Department's failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA) required a new section 366.22 hearing following proper notice to the relevant tribes as required by ICWA. Upon the Department's concession proper notice had not been given, this court ordered the juvenile court to vacate its May 2 order terminating reunification and setting a section 366.26 hearing.

On August 8, 2003, after the juvenile court had vacated its May 2 order and scheduled a new section 366.22 hearing, the Department submitted a report indicating

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[5] The Department noted, for example, Glen described his domestic disputes with Lena as "a mistake," and insisted he was unjustly convicted of rape because it involved an act of consensual sex with an adult.

Glen had recently missed one more drug test. In subsequent reports submitted after the section 366.22 was continued several times for ICWA compliance, the Department indicated Glen had tested positive for marijuana on three more occasions, most recently on October 16, 2003. In reports submitted November 25, 2003 and January 7, 2004 the Department expressed "serious concerns" that Glen was unable to maintain a drug-free lifestyle for more than a few months at a time.

A contested section 366.22 hearing was conducted by the juvenile court on January 20, 2004. The social worker testified Glen was in compliance with his case plan, but for the several positive drug tests and the missed tests. Glen testified he did not use drugs, and attributed his positive drug tests to "maybe some of the type food I do eat." At the conclusion of testimony, the Department's counsel requested the court terminate reunification for Glen and set a section 366.26 hearing, because his positive drug tests showed a pattern of relapse to drug use. After hearing argument, the court determined Glen had demonstrated a pattern of relapsing to drug use, and he had also shown he was unable to understand the importance of the matter by testifying the positive testing might have been the result of something he ate.[6] After also pointing out that Glen's status as a registered sex offender placed another obstacle to his ability to regain custody of Ashley,[7] the court found Ashley's return to Glen's care would create a substantial risk of detriment to her physical or emotional well-being, terminated reunification services, and set a hearing pursuant to section 366.26.

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[6] In the court's words, "[Glen] gets up and testifies, well, that must have been some food or something … [He] is not getting the message … He is not understanding how important it is … He would be much better off saying, yes, I took a positive."

[7] See Fam. Code, § 3030.

DISCUSSION

When we review a sufficiency of the evidence challenge, we may look only at whether there is any evidence, contradicted or uncontradicted, which supports the trial court's determination. We must resolve all conflicts in support of the determination, and indulge in all legitimate inferences to uphold the court's order. Additionally, we may not substitute our deductions for those of the trier of fact (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re John V.* (1992) 5 Cal.App. 4th 1201, 1212), and we have "no power to judge the effect or value of the evidence, to weight the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or the reasonable inferences to be drawn therefrom." (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 642.) Nor is a parent's compliance with his case plan the sole factor to be taken into account in determining whether there is a risk of detriment. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1139-1140; *In re Jasmon O.* (1994) 8 Cal.4th 398, 418-419.) The mere completion of the technical requirements of the reunification plan – such as participating in counseling and treatment programs and visiting the child – is just one consideration under the statute (§ 366.22), and the court must also consider to what extent the parent has ameliorated the conditions which required court jurisdiction. (*In re Dustin R., supra*, 54 Cal.App.4th at pp. 1141-1142.) And finally, in determining whether returning a child would create a substantial risk of detriment, the court must evaluate the likelihood that the parent will maintain a stable lifestyle for the rest of the minor's childhood. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 918.)

With this standard of review in mind, we find substantial evidence to support the court's finding the return of Ashley to Glen would create a substantial risk of detriment to Ashley's well-being. Glen was abusing drugs when Ashley was initially detained in August 2001, and his positive drug tests and missed tests more than two years later demonstrate that he has not resolved his substance abuse problem. The record also shows that Glen consistently fails to take responsibility for his actions and is entrenched in a pattern of denial, as shown by his characterization of his domestic dispute with Lena as

"a mistake," his insistence he was unjustly convicted of rape, and his claim a positive drug test must have been due to something he ate. There was thus substantial evidence that as of the 18-month review hearing, which is the statutory time limit for reunification, Glen had not successfully resolved his problems with drug abuse, and he was not capable of caring for Ashley without a substantial risk of detriment to her well-being.

DISPOSITION

Because substantial evidence supports the juvenile court's order to conduct a hearing pursuant to section 366.26, the petition is denied on the merits.

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WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.